STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 11, 2005
v	Nos. 253602; 257141 Wayne Circuit Court
CARLOS ISAAC AYALA, Defendant-Appellant.	LC No. 03-012197-01

Before: Cooper, P.J., and Fort Hood and R.S. Gribbs*, JJ.

PER CURIAM.

In these consolidated appeals, defendant Carlos Isaac Ayala appeals as of right his jury trial conviction of third-degree criminal sexual conduct (CSC).[1] Upon resentencing, defendant was sentenced to fourteen months to fifteen years' imprisonment. We affirm.

I. Factual Background

Defendant and complainant were acquainted before the alleged sexual assault occurred. Defendant's stepfather owned an apartment building. Defendant's stepfather also lived in the building. Defendant stayed in his stepfather's apartment and performed maintenance when he was in Michigan.[2] The complainant's father also lived in the building. He was employed as the building manager until he was fired shortly before the alleged sexual assault occurred. Defendant previously had a "casual sexual relationship" with the complainant's older sister, Ann Nelson.

Sometime between Thanksgiving and Christmas in 2002, defendant hired the complainant and her sister, Charlene, to clean empty apartments and common areas in the building. The complainant alleged that defendant took her into his apartment alone while Charlene was cleaning the hallways. Initially, defendant just talked with the complainant.

[1] MCL 750.520d(1)(a) (sexual penetration of a person between thirteen and sixteen years of age).

[2] Defendant traveled between Michigan and California where his wife and young child lived.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

However, he subsequently carried her into the bedroom, pulled down her pants and took off his own pants, and had intercourse with the complainant while wearing a condom. The complainant testified that defendant stopped when someone knocked on the apartment door. She testified that the intercourse was painful and caused her to bleed. She told no one of this incident until October of 2003. At that time she told Charlene. Charlene told Ms. Nelson, who, in turn, told the complainant's mother, who contacted the police.[3]

II. Effective Assistance of Counsel

Defendant contends that he was denied the effective assistance of counsel, as trial counsel failed to investigate and present his alibi defense and failed to present alibi and character witnesses. We disagree. Defendant moved for and was denied a new trial and a *Ginther*[4] hearing. Accordingly, our review is limited to plain error on the existing record affecting defendant's substantial rights.[5]

To establish ineffective assistance of counsel, a defendant must show: (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms; and (2) that, but for the attorney's error, a different outcome reasonably would have resulted.[6] A defendant claiming ineffective assistance of counsel must overcome the strong presumption that the attorney was exercising sound trial strategy.[7]

Defendant asserts that he was with his wife and child in California between Thanksgiving and Christmas in 2002. Although defendant claims that trial counsel should have called alibi and character witnesses, he has neither named these witnesses nor supplied affidavits from these witnesses regarding their potential testimony. There is also no record evidence to support defendant's claims that a private investigator would have uncovered evidence to support his alibi defense or that trial counsel failed to develop or investigate this defense. Furthermore, trial counsel's decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which we will not review with the benefit of hindsight.[8] Accordingly, defendant has not overcome the presumption that trial counsel effectively investigated his defense and exercised sound trial strategy in determining which witnesses and evidence to present.

---

[3] The defense theory was that the complainant and her family fabricated the alleged assault in retaliation for defendant's stepfather firing the complainant's father and for defendant breaking up with Ms. Nelson. Defendant contended that the ten-month period between the alleged incident and the complainant's revelation was further evidence of fabrication.

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[5] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

[6] *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

[7] *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

[8] *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant similarly claims that trial counsel, the prosecutor, and the trial court prevented him from presenting the testimony of several character and alibi witnesses. He alleges that he sent a list of these witnesses to the trial court, but both the trial court and his counsel failed to assist him in calling these witnesses. Without considering whether the trial court was obligated to take any action upon receiving this witness list, we note that this list is not part of the record. As previously noted, defendant also has not created a record of the potential testimony to be presented. Furthermore, defendant never attempted to call any witnesses on his own behalf. Accordingly, he cannot establish the existence of any error.

Defendant also contends that trial counsel was ineffective for failing to remove a juror who indicated during voir dire that her son was dating a woman who gave birth to a child as the result of a violent rape. Jury selection is a matter of trial strategy. Attorneys must rely on subjective perceptions, such as a juror's facial expressions or manner of answering questions, which this Court does not have the opportunity to observe.[9] This juror honestly stated her reservations on the record, but also indicated that she could follow the trial court's instructions and render an unbiased opinion. Without the ability to observe the juror's answers during voir dire, we cannot assume that trial counsel unreasonably failed to seek her removal. However, even if counsel's conduct was unreasonable, defendant cannot establish that this error was outcome determinative. The juror's experience was very different than defendant's alleged offense and defendant has not shown that the juror may have swayed a jury that was otherwise disposed to acquit. Accordingly, he has not established that counsel was ineffective for failing to remove the juror.

Finally, defendant contends that trial counsel improperly advised defendant that he should not testify. As this was a close credibility contest, defendant argues that his failure to testify was outcome determinative. Advising a defendant whether to testify on his or her own behalf is a matter of trial strategy, which we will not second-guess.[10] However, we note that defendant never stated on the record that he wished to testify and has made no record of his potential testimony. Following the complainant's testimony, defendant only stated his desire to "address the court." The trial judge informed defendant of his right to testify, subject to cross-examination, but advised defendant that this was not the time in the proceedings to make a statement. Defendant never repeated his desire to address the court and did not assert his right to testify. Under the circumstances, defendant has not overcome the strong presumption that counsel's advice was sound trial strategy.

III. Evidentiary Issues/Prosecutorial Misconduct

A. Prior Consistent Statements

Defendant contends for the first time on appeal that the prosecutor improperly bolstered the complainant's credibility by referring to her prior consistent statements to the police and prosecution. The prosecutor elicited testimony regarding these statements during direct

[9] *People v Robinson*, 154 Mich App 92, 94-95; 397 NW2d 229 (1986).

[10] *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

examination and referred to these statements in closing argument. Defendant objected to the prosecutor's questions below, but on relevancy grounds rather than based on the improper use of a prior consistent statement. Accordingly, defendant's claim of error is unpreserved.[11] Generally, claims of prosecutorial misconduct are reviewed de novo, but unpreserved claims are reviewed for plain error affecting the defendant's substantial rights.[12] We review claims of prosecutorial misconduct case by case, examining the pertinent portion of the record and evaluating the prosecutor's remarks in context.[13] The prosecutor's comments must be read as a whole and evaluated in light of their relationship to defense arguments and the evidence admitted at trial.[14] Unpreserved claims of evidentiary error are also reviewed for plain error.[15]

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[16] A witness' prior statement is not hearsay, however, if "[t]he declarant testifies at the trial and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. . . ."[17] The complainant's prior statements are inadmissible hearsay. Defendant implied that the complainant fabricated the allegations in October of 2003, but her statements to the authorities were made *after* that time. The statements were made prior to trial, but not prior to the time that defendant contends she fabricated the allegations.[18] While the use of these statements was improper, it is not reversible error. As there was overwhelming evidence against defendant, this error did not affect the outcome of his trial.

Defendant also claims that the prosecutor improperly referred to these statements in closing argument. A prosecutor may argue the evidence and all reasonable inferences arising from the evidence as it relates to his or her theory of the case, including the credibility of witnesses.[19] The prosecutor improperly bolstered the complainant's credibility by relying on these inadmissible hearsay statements. However, as previously noted, this error was not outcome determinative. Accordingly, defendant is not entitled to relief.

---

[11] MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 632 NW2d 67 (2002).

[12] *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

[13] *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

[14] *Id.*

[15] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[16] MRE 801(c).

[17] MRE 801(d)(1)(B).

[18] See *Tome v United States*, 513 US 150, 157; 115 S Ct 696; 130 L Ed 2d 574 (1995) (holding that FRE 801(d)(1)(B), which is identical to MRE 801(d)(1)(B), "plainly defines prior consistent statements as nonhearsay *only* if they are offered to rebut a charge of 'recent fabrication or improper influence or motive'") (citations and internal quotes omitted).

[19] *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996); *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996).

B. Prior Bad Acts Evidence

Defendant argues that the prosecutor improperly introduced evidence that he had an extramarital affair with the complainant's sister and falsely insinuated that he came from a wealthy family by introducing evidence that his stepfather owned an apartment building. He further contends that trial counsel was ineffective for failing to object to the admission of this evidence, and that the trial court should have sua sponte excluded this evidence.

We first note that this evidence was highly relevant as it explained how defendant and the complainant were acquainted. Defendant contends that, as adultery is a felony in Michigan,[20] the prejudicial effect of this evidence outweighed its probative value. The prosecution made no improper disparaging inferences from these facts. Defendant also relied on these facts to support his theory that the complainant had motive to fabricate the offense.[21] As defendant relied upon this highly relevant evidence, he may not now claim error.

C. Use of False Testimony

Defendant alleges that the prosecution improperly failed to correct false testimony presented by Ms. Nelson regarding the date on which she learned of the alleged sexual assault. A prosecutor may not knowingly use false testimony to obtain a conviction and must correct false evidence.[22] However, it is clear from Ms. Nelson's testimony that she was uncertain of the date on which Charlene told her of the alleged assault and the prosecutor did attempt to clarify this date.[23] Furthermore, the discrepancy in the dates is minor and would have little effect on the defense theory of fabrication. Accordingly, defendant has not established error entitling him to relief.

VI. Sentencing Issues

Defendant contends that the trial court improperly scored offense variable (OV) 10 based on facts not found by the jury in violation of the United States Supreme Court decision in *Blakely v Washington*.[24] The sentencing court has discretion in determining the number of points

---

[20] MCL 750.30.

[21] If the jury was not told that the complainant's father worked for defendant's stepfather and that defendant had a previous relationship with Ms. Nelson, defendant's claim of fabrication would make little sense. Furthermore, defendant insinuated that the complainant's family made these allegations to extort money from his family.

[22] *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998).

[23] Ms. Nelson testified that she learned of the alleged assault on October 30 or 31, 2002. She then corrected her testimony and indicated that she was told in 2003. However, both the complainant and Charlene testified that Ms. Nelson was told on October 13, 2003. On redirect examination, Ms. Nelson testified that she was certain that she was told in October.

[24] *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

to be scored provided that there is evidence on the record that adequately supports a particular score.[25] However, we review preserved constitutional error de novo.[26]

Pursuant to MCL 777.40, a sentencing court may score ten points for OV 10 if "The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status."[27] At sentencing, the trial court agreed with defendant's contention that he could not be scored ten points based on the complainant's age as age is an element of the underlying offense. The trial court determined that ten points was still an appropriate score because defendant was a trusted family friend and larger than the complainant.[28] Defendant contends that the trial court was precluded from considering these factors in calculating his sentence, as the jury only found sexual penetration of a thirteen-year-old victim. However, a majority of the Michigan Supreme Court has already determined that *Blakely* does not apply to Michigan's indeterminate sentencing guidelines in which the maximum sentence is set by law.[29] Accordingly, the trial court could properly consider any record evidence in determining defendant's sentence.

Defendant also contends that the trial court failed to recognize its discretion to impose an intermediate sanction. An "intermediate sanction" is "probation or any sanction other than imprisonment in a state prison or state reformatory, that may lawfully be imposed," such as jail time or counseling.[30] Based on the scoring of defendant's offense and prior record variables, his minimum sentence range was twelve to twenty months. Therefore, pursuant to MCL 769.34, the trial court could, in its discretion, impose an intermediate sanction.[31] The trial court affirmatively noted its right to impose an intermediate sanction and chose not to do so, sentencing defendant to fourteen months to fifteen years imprisonment. This sentence is within the appropriate minimum guidelines range, and we must, therefore, affirm.[32]

VII. Pretrial Detention

---

[25] *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

[26] *People v Garza*, 469 Mich 431, 433; 670 NW2d 662 (2003).

[27] MCL 777.40(1)(b).

[28] We note that exploitation of a victim based on a difference in size supports a score of five points under subsection (1)(c). However, defendant does not challenge the court's findings on this ground.

[29] *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004) (Justices Cavanagh, Weaver, and Young concurred with Justices Taylor and Markman, writing for the Court, that *Blakely* is inapplicable in Michigan); *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005).

[30] MCL 750.31(b).

[31] MCL 769.34(4)(d); *People v Martin*, 257 Mich App 457, 459-460; 668 NW2d 397 (2003).

[32] MCL 769.34(10); *People v Babcock*, 469 Mich 247, 268; 666 NW2d 231 (2003).

Defendant contends that the trial court improperly imposed a $20,000 bond, rather than releasing him on his own recognizance. A trial court must release a defendant on personal recognizance, unless it determines "that such release will not reasonably ensure the appearance of defendant as required, or that such release will present a danger to the public."[33] If the court determines that release on his own recognizance is not appropriate, it may require the defendant to post bond.[34] In deciding whether to impose a bond requirement or what terms and conditions to impose, the court must consider several factors, including the "defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution, and the defendant's ties to the community, including family relationships."[35]

The trial court imposed bond based on previous charges brought against defendant in California, which were ultimately dismissed, and as defendant maintained addresses in both California and Florida. Although defendant asserts that he attended all court proceedings related to the California charges, there is no record evidence to support his claim. Furthermore, the risk that defendant might leave the jurisdiction with the support of family or friends in two other states was sufficient to impose bond.

VIII. Polygraph Examination

Defendant alleges for the first time on appeal that the prosecution promised to dismiss the charges against him if he passed a polygraph examination, but then failed to administer the test. However, nothing in the record suggests that such a promise was made. Accordingly, defendant cannot establish any error.

IX. Hybrid Representation

Defendant contends that the trial court denied him the opportunity to cross-examine witnesses on his own behalf. Specifically, defendant asserts that he would have questioned Charlene regarding conversations in which the complainant denied having intercourse with defendant. He also asserts that the trial court prevented him from making a record of this proffered testimony.

However, defendant does not contend that he was denied the opportunity to represent himself. Rather, he contends that he was denied a hybrid representation, in which he could exercise those strategies rejected by counsel while still retaining counsel. This Court has clearly stated that "there is no constitutional right to a hybrid defense and, thus, a trial court is not required to order hybrid representation."[36] As there is no record that defendant requested a

---

[33] MCR 6.106(C).

[34] MCR 6.106(E).

[35] MCR 6.106(F)(1)(c) and (h).

[36] *People v Kevorkian*, 248 Mich App 373, 420; 639 NW2d 291 (2001). See also *United States v Mosley*, 810 F2d 93 (CA 6 1987):

(continued…)

hybrid defense, to represent himself, or even to personally cross-examine this witness, he cannot establish that any error occurred.

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs

(…continued)

> There are obvious justifications for the refusal to allow hybrid representation in criminal trials, regardless of the legal experience of the defendant. The potential for undue delay and jury confusion is always present when more than one attorney tries a case. Further, where one of the co-counsel is the accused, conflicts and disagreements as to trial strategy are almost inevitable. [*Id.* at 98.]